TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT BECAUSE GENUINE ISSUES OF MATERIAL FACT EXIST AS TO THE DEFENDANTS' COLLATERAL PURPOSES FOR FILING AND PROSECUTING THE INJUNCTION AND THE AMENDED PETITION FOR LIBEL AND SLANDER IN THAT:

A. THERE ARE FACTS TO SUPPORT A FINDING THAT THE DEFENDANTS WRONGFULLY UTILIZED THE *DEROUIN HOMES, INC. V. ROMEO* LAWSUIT TO PROHIBIT THE ROMEOS FROM MAKING TRUTHFUL STATEMENTS CONCERNING THEIR HOUSE AND RONALD J. DEROUIN'S PROFESSIONAL APTITUDE AND BUILDING STANDARDS SO AS TO ALLOW RONALD J. DEROUIN TO SELL HOMES HE WAS BUILDING THROUGH HIS COMPANY, R.J. DEROUIN HOMES, INC.

Throughout their brief, Respondents claim innocence of an abuse of process on two grounds. First, Respondents seek to escape liability by claiming that all they did was pursue the lawsuits to their authorized conclusion. Second, the Respondents acted not for an improper purpose but, at best, an evil motive. In discussing a law firm's liability for abusing process, the court in Givens v. Mullikin, 75 S.W.3d 383 (Tenn 2002) recognized the public policy concerns surrounding the need for an action

for abuse of process. While acknowledging the general rule that the presence of an "*incidental* spiteful motive" will not result in the necessary intent to evidence an abuse, "a different case is presented when the *primary* purpose of using the court's process is for spite or other ulterior motive." Id. at 401. Further, the Givens court held that a plaintiff stated a cause of action for abuse of process if the plaintiff establishes that the "'use of various legal processes was not for [the] legitimate or reasonably justifiable purposes of advancing [the party's] interests in the ongoing litigation.'" Id. citing Nienstedt v. Wetzel, 651 P.2d 876, 882 (App. 1982). Respondent Farkas informed his client that the *DeRouin v. Romeo* lawsuit had "been successful in quieting the Romeos . . . ." L.F. 300-02. Romeos have presented evidence that Respondents used process in both the injunction and defamation actions not for their authorized purposes but for the improper purposes of silencing the Romeos and thereby permitting DeRouin to sell his houses.

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT BECAUSE GENUINE ISSUES OF MATERIAL FACT EXIST AS TO THE DEFENDANTS' COLLATERAL PURPOSES FOR FILING AND PROSECUTING THE INJUNCTION AND THE AMENDED PETITION FOR LIBEL AND SLANDER IN THAT:

B. THERE ARE FACTS TO SUPPORT A FINDING THAT THE DEFENDANTS WRONGFULLY UTILIZED THE *DEROUIN*

HOMES, INC. V. ROMEO LAWSUIT TO CONDUCT DISCOVERY TO OBTAIN INFORMATION TO BE USED FOR DEFENDING DELL JONES AND ASSOCIATES, INC., ANOTHER COMPANY CONTROLLED BY RONALD J. DEROUIN, IN THE EVENT A LAWSUIT WAS FILED AGAINST DELL JONES AND ASSOCIATES, INC.

Respondents profess that the discovery used in *DeRouin v. Romeo* was "completely proper . . . ." Resp. Br. 81. This is not the proper focus, however. If that were a sufficient defense, then there would be no need for an abuse of process case. Most abuse of process actions involve a "completely proper" action. The gist of an abuse of process is utilizing a proper action for an **improper purpose**. Here, Romeos have presented evidence of this improper purpose: to obtain information, via discovery tools, about a completely different claim and lawsuit.

Respondents **now** allege that the discovery referenced in Farkas' February 23, 1995 letter was limited to a Request for Production of Documents. Resp. Br. 82. There is no support for this statement. Additionally, Farkas' own letter states that he didn't "find anything in particular of concern in the discovery ***answers***." L.F. 297 (emphasis added). Obviously, Farkas drafted interrogatories for the sole purpose of "establishing a defense" for a different lawsuit.

Respondents also opine that they were justified in abusing discovery because this was directly in response to the Romeos' statement that they were going to sue

Respondents for malicious prosecution and abuse of process. Resp. Br. 82-83. However, the discovery drafted by Farkas had nothing to do with any future malicious prosecution action by the Romeos. As Farkas himself states in his own letter, "[t]he bulk of the discovery is directed at establishing a defense for you should the Romeos follow-up on their threats to file suit ***based upon the alleged construction defects.***" L.F. 297. The house, of course, was constructed by Dell Jones and Associates. Any suit for construction defects would have been against Dell Jones and Associates, not R.J. DeRouin Homes, Inc.

In Givens v. Mullikin, 75 S.W.3d 383 (Tenn 2002), the court held that the plaintiff stated a cause of action for abuse of process where "the civil discovery procedures" were "used with the specific and malicious intent to weaken the resolve of the other party . . . ." Id. at 401. In reaching this holding, the court reasoned that the law firm's wrongful conduct was "used 'to accomplish some end which [was] without the regular purview of the process.'" Id.

Romeos have presented sufficient evidence to at least raise a question as to the improper purpose of Respondents. Romeos have pled that the improper purposes, among others, were to obtain relief not sought in the petition for the purpose of silencing the Romeos and to obtain information about claims not the subject of *DeRouin v. Romeo*. In support of those allegations, Romeos respectfully direct this Court to the following:

1) Respondent Farkas' statement that ***his*** purpose was to shut the Romeos up. L.F. 641;

2) Respondent Farkas' letter wherein he states "[t]his case [*DeRouin v. Romeo*] has been successful in quieting the Romeos . . . ." L.F. 300-02;

3) Respondent Farkas' letter wherein he states that the purpose of ***his*** drafted discovery was to obtain information from the Romeos before they file a different lawsuit. L.F. 297.

II. THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS A MATTER OF LAW BECAUSE:

A. THE DOCTRINE OF SPLITTING A CAUSE OF ACTION DOES NOT APPLY TO BAR PLAINTIFFS' CLAIMS, IN THAT (1) ANY CLAIMED DEFENSE OF SPLITTING A CAUSE OF ACTION IS WAIVED IF IT IS NOT PLED AND HERE THE DEFENDANTS HAVE NOT PLED THAT PLAINTIFFS SPLIT THEIR CAUSE OF ACTION AND ANY SUCH DEFENSE IS WAIVED; (2) THE DOCTRINE OF SPLITTING A CAUSE OF ACTION DOES NOT PROHIBIT PLAINTIFFS FROM SUING JOINT TORTFEASORS INDIVIDUALLY AND HERE THE DEFENDANTS ARE JOINTLY AND SEVERALLY LIABLE WITH RONALD J. DEROUIN AND R.J.

DEROUIN HOMES INC. FOR THE DAMAGES CLAIMED BY PLAINTIFFS; AND (3) THE DOCTRINE OF SPLITTING A CAUSE OF ACTION PROHIBITS A SUBSEQUENT ACTION AGAINST THE SAME DEFENDANT BUT HERE, THE DEFENDANTS ARE NOT THE SAME DEFENDANTS AS THOSE IN *ROMEO V. DEROUIN*.

Respondents cite this Court to Macke Laundry Serv. Ltd. v. Jetz Serv. Co., 931 S.W.2d 166 (Mo.App. W.D. 1996) for the proposition that they were merely the "alter ego" of DeRouin and, accordingly, are the same party for purposes of splitting a cause of action. Resp. Br. 67. First, Macke was in the context of conspiracy, not splitting a cause of action. Second, Respondents provide a very limited holding of Macke. Macke stands for the proposition that, as a general rule, an attorney and his client are incapable of forming a conspiracy. Id. at 176. "That is not to say that an attorney, as an agent, ***can never be held liable for conspiracy with a client***, the attorney's principal." Id. (emphasis added). The attorney can be liable "for conspiracy with the principal if the [attorney] acts out of a self-interest which goes beyond the agency relationship." Id. Furthermore, Macke states the well-accepted rule that an attorney, "may be liable even though the attorney is acting within the scope of the attorney/client relationship . . . ." Id. "The Missouri Supreme Court . . . noted that there has been a long history in Missouri of holding an attorney liable to third parties in malicious prosecution and false imprisonment actions." Id. at 177.

"The Court, in Stafford v. Muster, 582 S.W.2d 670 (Mo.banc 1979), following the historical precedent . . . ruled that there was also a cause of action against an attorney for abuse of process." Id. Clearly, this Court is not of the opinion that an attorney and his client "form the same functional entity" for purposes of either an abuse of process case, or splitting a cause of action defense.

In support of Respondents' splitting the cause of action argument, Respondents cite this Court to the cases of Horwitz v. Horwitz, 16 S.W.3d 599 (Mo.App. E.D. 2000) and Eugene Alper Const. Co. v. Joe Garavelli's of West Port, Inc., 655 S.W.2d 132 (Mo.App. E.D. 1983). Surprisingly, though, Respondents forgot to mention the case of Irwin v. Bertelsmeyer, 730 S.W.2d 302 (Mo.App. E.D. 1987), a case which is legally indistinguishable from the case at bar. Additionally, Respondents fail to mention or address the case of Arana v. Koerner, 735 S.W.2d 729 (Mo.App. W.D. 1987). Both Irwin and Arana flatly reject the defense of splitting the cause of action where the defendants, as the Respondents herein, are joint tortfeasors. Respondents' failure to address both Arana and Irwin is even more surprising since Romeos cited to those cases in their Substitute Brief.

Still, Respondents' reliance upon Eugene Alper Construction Company, Inc. v. Joe Garavelli's, 655 S.W.2d 132 (Mo. App. 1983) and Horwitz v. Horwitz, 16 S.W.3d 599 (Mo. App. E.D. 2000) provides no support for their position that Plaintiffs have split their cause of action. Neither of these cases are applicable here. Horwitz involved the **same** parties—husband and wife. Husband instituted a divorce

action. Thereafter, wife filed a separate action for various tort claims. The court then granted husband's motion to join the two actions. The court issued a judgment of dissolution and then granted husband's motion to dismiss wife's tort claims. The court held that wife had split her cause of action. In citing and quoting from Horwitz, Defendants conveniently left out that portion of the opinion where the appellate court noted that "both lawsuits involve ***the same parties***." Id. at 604 (emphasis added). The claim in Eugene Alper Construction also involved the same parties. Eugene Alper Construction provides the same support for Defendants as does Horwitz—none.

Respondents are operating under the mistaken belief that in order for them to be personally liable, Romeos must establish that Respondents took actions *outside* the scope of their representation of DeRouin. However, under Respondents' own relied-upon authority, Macke Laundry Serv. Ltd. v. Jetz Serv. Co., 931 S.W.2d 166 (Mo.App. W.D. 1996), clearly no such requirement is necessary. The Macke court noted the well-established rule that an attorney can be liable for acts committed *within* the scope of his representation where that attorney committed tortious or wrongful acts, otherwise known as the exceptional circumstances rule. Macke at 177.

Even if Respondents were correct, Romeos have presented substantial evidence that Respondents engaged in wrongful and tortious conduct. Respondent Farkas authored correspondence wherein he informs DeRouin that Farkas was "able to orchestrate" a delay of depositions of key witnesses with the hope that DeRouin would have all remaining homes sold, at which time ***Farkas*** would dismiss the

DeRouin lawsuit. L.F. 303-04. Respondent Farkas authored correspondence to DeRouin wherein he notified his client, R.J. DeRouin Homes, Inc., that the ***avowed purpose*** in ***Farkas'*** discovery was to obtain information, not about the Romeos' defense in that lawsuit, but about any claims the Romeos might bring in the future against another of Respondents' client, Dell Jones & Associates. L.F. 297.

II. THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS A MATTER OF LAW BECAUSE:

B. THE DOCTRINE OF RES JUDICATA DOES NOT APPLY TO BAR PLAINTIFFS' CLAIMS, IN THAT:

(1) RES JUDICATA BARS AN ACTION PREVIOUSLY ADJUDICATED ON THE MERITS AND HERE THERE HAD PREVIOUSLY BEEN NO ADJUDICATION ON THE MERITS OF PLAINTIFFS' CLAIMS SET FORTH IN THE *ROMEO V. JONES, ET AL.* PETITION.

Respondents devote a substantial portion of their brief to discussing the Restatement (Second) Judgment and its application of the adjudication element. Almost hidden in their brief is a substantial admission. "Respondents acknowledge that Comment e does carve out an exception for those situations when, by statute or rule of court, the judgment for failure to prosecute does not operate as a bar to another action on the same claim." Resp. Br. 54-55. Respondents have desperately

tried in vain to avoid the obvious conclusion: there was no adjudication in *DeRouin v. Romeo*.

Respondents continue to confuse the "adjudication" requirement necessary for the imposition of res judicata. The *DeRouin v. Romeo* lawsuit was terminated, not adjudicated. While every adjudication equates to a termination, the converse is not true. Respondents argue that since the Romeos could not re-file a claim against DeRouin then for "all intents and purposes" there must have been an adjudication. Whether the Romeos could re-file has nothing to do with the affirmative defense of res judicata but has everything to do with the other affirmative defenses of "release" and "statute of limitations."

Subscribing to Respondents' position means no purpose is served by the affirmative defenses of release and statute of limitations. For example, when a defendant is sued one day after the applicable statute of limitations has run, Respondents would argue that the running of the limitations is the same as an adjudication on the merits for purposes of res judicata. In that case, the defendant would not raise the affirmative defense of statute of limitations, but instead the defense of res judicata. To Respondents, the running of the statute of limitations is an adjudication on the merits, for "all intents and purposes."

Likewise, the absurdity of Respondents' argument can be seen by following it to its logical conclusion with respect to a settlement and release. Had Romeos, instead of filing a lawsuit against DeRouin, resolved their claims with him and executed a

release, again Respondents would argue that this release, "for all intents and purposes" operated as an adjudication on the merits. If this is the law in Missouri, Romeos fail to see the need for the affirmative defenses of release or statute of limitations. According to Respondents either the running of the limitations period or the execution of a release is the same as an adjudication on the merits. Such a conclusion is illogical and without support. In Hill v. Air Shields, Inc., 721 S.W.2d 112 (Mo.App.E.D. 1986), the Missouri Court of Appeals held that an action had not been adjudicated on the merits for purposes of res judicata where it had first been ***settled*** and then ***dismissed***, a factual scenario indistinguishable from *DeRouin v. Romeo*. While the action in Hill had terminated, it had not for "all intents and purposes" been adjudicated for purposes of res judicata.

II. THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS A MATTER OF LAW BECAUSE:

B. THE DOCTRINE OF RES JUDICATA DOES NOT APPLY TO BAR PLAINTIFFS' CLAIMS, IN THAT:

(2) RES JUDICATA BARS AN ACTION WHERE THAT ACTION INVOLVES THE SAME THING SUED FOR, THE SAME CAUSE OF ACTION, THE SAME PARTIES AND THE SAME QUALITIES OF PERSONS BUT HERE THE PARTIES IN *ROMEO V. JONES, ET AL.* ARE NOT THE SAME PARTIES

OR IN PRIVITY THERETO WITH THOSE IN *ROMEO V. DEROUIN*; THE THING SUED FOR DIFFERS BETWEEN *ROMEO V. JONES, ET AL.* AND *ROMEO V. DEROUIN*; AND THE CAUSE OF ACTION DIFFERS BETWEEN *ROMEO V. JONES, ET AL.* AND *ROMEO V. DEROUIN*.

(a) The Third Identity: The present defendants are not in privity with the defendants from the prior adjudication.

Respondents' approach in discussing the third element of res judicata, i.e. privity, is misdirected. The footing for their argument is that Missouri law provides that res judicata prevents a subsequent action against the agent, where there exists a prior judgment in favor of the principal, because of the derivative responsibility present between principal and agent. Resp. Br. 45. However, their support is faulty. While Missouri law does recognize the general statement, Missouri also recognizes that a release of the principal ***does not also release*** the agent where the release expressly reserves a claim against the agent. Aherron v. St. John's Mercy Medical Center, 713 S.W.2d 498 (Mo.banc 1986). The issue then is whether the Romeos reserved their claim against Jones, et al. The Release between Romeos and DeRouin provides that the Romeos:

do hereby release and discharge Ronald J. DeRouin, R.J. DeRouin Homes, Inc., Don Jones, Jack Elmo, Dell Jones and Associates, Inc., Dell Properties,

> Inc., D.R. Jones and Associates, Inc., Gateway Properties, Inc. (hereinafter "Released Parties") and their heirs, executors, administrators and assigns,
>
> . . .
>
> This release is made pursuant to §537.060 Mo.Rev. Statutes, and this release is limited to the specific persons identified above . . . . This release shall not release any attorney who participated in, or assisted in preparation, filing or prosecution of, the cause styled *R.J. DeRouin Homes, Inc. v. Darlene Romeo and Richard Romeo*, nor shall this release apply to release any law firm or entity with which such attorneys engaged in the practice of law. Without limitation, included in persons and entities NOT RELEASED are: Robert E. Jones; the law firm of Jones, Korum & Jones; Alan L. Farkas; the law firm of Jones, Korum, Waltrip & Jones; and any persons being partners in such law firms.

L.F. 202. (emphasis in original). As Respondents' privity argument fails to acknowledge Aherron but instead is built upon a mistaken belief in the law, their entire argument collapses.

Respondents' cases, Berwald v. Ratliff, 782 S.W.2d 709 (Mo.App. W.D. 1989) and Ingells v. Citizen State Bank, 632 S.W.2d 9 (Mo.App. 1982) are factually distinguishable. Those opinions are applicable **only** in cases of respondeat superior. Jordan v. Kansas City, 929 S.W.2d 882 (Mo.App. W.D. 1996). Here, Romeos have charged Respondents with independent wrongs. A simple reading of the Petition will

lead the reader to conclude that Romes are alleging independent wrongs by Respondents. Romeos clearly have not pled that Jones and Farkas are simply vicariously liable. Their wrongful conduct stands on its own.

Respondents cite this Court to Macke Laundry Serv. Ltd. V. Jetz Serv. Co., 931 S.W.2d 166 (Mo.App. W.D. 1996) for the proposition that an attorney is the alter ego of the client. Resp. Br. 46. However, Macke was in the context of conspiracy, not res judicata. Additionally, Respondents provide a very limited holding of Macke. Macke stands for the proposition that, as a general rule, an attorney and his client are incapable of forming a conspiracy. Id. at 176. "That is not to say that an attorney, as an agent, ***can never be held liable for conspiracy with a client***, the attorney's principal." Id. (emphasis added). The attorney can be liable "for conspiracy with the principal if the [attorney] acts out of a self-interest which goes beyond the agency relationship." Id. Furthermore, Macke states the well-accepted rule that an attorney, "may be liable even though the attorney is acting within the scope of the attorney/client relationship . . . ." Id. This Court "noted that there has been a long history in Missouri of holding an attorney liable to third parties in malicious prosecution and false imprisonment actions." Id. at 177. "The Court, in Stafford v. Muster, 582 S.W.2d 670 (Mo.banc 1979), following the historical precedent . . . ruled that there was also a cause of action against an attorney for abuse of process." Id.

Respondents cite this Court to Geringer v. Union Electric Co., 731 S.W.2d 859 (Mo.App. E.D. 1987) for the proposition that privity exists between an attorney and

the client. Resp. Br. 48. Geringer is factually distinguishable in that the liability for the attorney in that case was premised upon vicarious liability. Id. at 865. The court found privity in Geringer because the attorneys had an ***interest*** in the prior action against their clients since Sachs' & Miller's liability turned on whether their client acted improperly. Accordingly, since Sachs & Miller were not being charged with any individual wrongful conduct, if their client (i.e. the principal) was absolved in the first lawsuit, then that exoneration would extend to them (i.e. the agent). The same clearly is not true here.

The outcome of *Romeo v. DeRouin* would have no impact or bearing on the liability of Respondents in *Romeo v. Jones, et al.* Again, Respondents are charged with their own wrongful conduct. In Givens v. Mullikin, 75 S.W.3d 383 (Tenn 2002), the court held the client was not liable for the abuse of process committed by client's attorneys. The Givens' court acknowledged the well-reasoned principle that a client is not liable for the intentional tortious conduct committed by client's attorney unless the "client is implicated in some way other than merely being represented by the attorney . . . ." Id. at 397. In Givens, the attorneys' liability was not premised upon the client, but was premised upon the attorneys' own tortious conduct. Accordingly, even if *Romeo v. DeRouin* had gone to trial and a jury had absolved DeRouin of any liability, Respondents can still be found liable since Romeos have pled that Respondents acted pursuant to their own wrongful intent.

Respondents clearly confuse the privity requirement. They are operating under the mistaken belief that privity is a function of the type of relationship between the represented and non-represented parties as a point in time prior to the litigation. This Court has previously set forth the standard for determining the presence of privity for purposes of res judicata. "[P]rivity . . . exists in relation to an identity of interests in the subject matter of the litigation." American Polled Hereford Association v. City of Kansas City, 626 S.W.2d 237, 241 (Mo. 1982). "It is not established from the mere fact that persons may happen to be interested in the same question, or in proving or disproving the same state of facts." Id.

One can easily see the "identity of interests" if one looks at the typical privity situation. Owner A sues Owner B in action for quiet title relating to real estate. Owner B prevails and then sells his land to Owner C. Owner A files a new action for quiet title, but this time against Owner C. Owner C could successfully defend this action on the grounds of res judicata. In response, Owner A would argue that Owner C was not the defendant in the first action. However, Owner C was in privity with Owner B. Since Owner C's rights or interests were determined by the outcome of the first action, Owner C had an identity of interests with Owner B. Accordingly, Owner C and Owner B are in privity.

Applying the standard announced in American Polled Hereford Association, one can easily see the lack of privity between DeRouin and Respondents. Pursuant to American Polled Hereford Association, the issue is whether there existed an identity of

interests between DeRouin and Jones in the subject matter of the *Romeo v. DeRouin* litigation. Respondents had no interest in that litigation. The liability of Respondents for their wrongful conduct is independent of the wrongful conduct of DeRouin. Givens v. Mullikin, 75 S.W.3d 383 (Tenn 2002). Even had *Romeo v. DeRouin* resulted in a trial with a jury rendering judgment in favor of DeRouin, this would not affect the liability of Respondents as they are being charged with separate, different, independent wrongs. While Respondents may happen to be interested in proving or disproving the same state of facts as DeRouin, that is not sufficient to establish privity.

(b) The First Identity: The subject matter of *Romeo v. Jones, et al.* differs from that of *Romeo v. DeRouin.*

In Point II of their substitute brief to this Court, Respondents argue that portions of the Romeos' substitute brief raise new arguments and therefore, this Court should not consider Romeos' newly adopted arguments. Resp. Br., p. 31. Respondents' position is faulty for a number of reasons. First, Romeos have not raised new arguments. Secondly, on review of granting a motion for summary judgment, the non-moving party is not bound by the arguments advanced in their trial court-filed memorandum. Finally, their cited authority fails to support their position.

Respondents' argument fails due to the fact that these are not new arguments advanced by the Romeos. Specifically, Respondents complain that the Romeos are now arguing, for the first time, that res judicata does not apply because of the absence

of the first and second identities. Resp. Br. 29-30. Respondents also complain that the Romeos raise a public policy argument. Resp. Br. 30. However, this is not the first time that the Romeos have argued this. The gist of Romeos' argument in their Substitute Brief is that the first of the four elements in res judicata is absent because the subject matter of *Romeo v. DeRouin* differs from that of *Romeo v. Jones, et al.* Romeos advanced that precise argument in both their memorandum (Supp. L.F. 729-735) filed in opposition to Respondents' amended motion for summary judgment and in their brief before the Missouri Court of Appeals, Eastern District.

This appeal arises out of the granting of Respondents' amended motion for summary judgment. On January 12, 2001, Respondents filed their amended motion for summary judgment. In response thereto, Romeos filed Plaintiffs' Response to Defendants' Amended Motion for Summary Judgment (L.F. 273-285) as required by the Rules of Civil Procedure. Romeos also filed, at that time, a memorandum of law in opposition to Respondents' motion (Supp. L.F. 720-744). This memorandum merely sets forth Romeos' arguments to the motion. The filing of this memorandum is optional. Rule 74.04(c) states that the *non-moving* party *may* file a memorandum in addition to its response. Additionally, this memorandum is not to be included as part of the record on appeal. Missouri Supreme Court Rule 81.12. Consequently, it is difficult to understand Respondents' position that Romeos are limited to the arguments contained therein.

Non-moving parties to a summary judgment may raise new arguments on appeal. In Deer Run Property Owners Association v. Bedell, et al., 52 S.W.3d 14 (Mo.App. S.D. 2001), Deer Run Subdivision appealed the granting of a motion for summary judgment. In their brief, Deer Run Subdivision argued for the first time that there were genuine issues of material fact regarding whether Deer Run Property Owners Association had the authority to levy assessments. The appellate court noted the general rule that "[a]rguments raised . . . for the first time present nothing for appellate review." Id. at 16, fn. 2. "However, as these arguments were raised by Appellants in their response to Respondent's request for summary judgment, we address them as required by the standard of review." Id.

Finally, Respondents' cited authority does not stand for their advanced position. Seitz v. Lemay Bank and Trust Co., 959 S.W.2d 458 (Mo. banc 1998) stands for the proposition that issues raised on appeal must first have been raised in a motion for directed verdict and judgment notwithstanding the verdict. Id. at 462. Obviously that is factually distinguishable from the procedural background of this case. State ex rel. Nixon v. Am. Tobacco Co., 34 S.W.3d 122 (Mo. banc 2001) stands for the proposition that in ruling on a denial of a motion to intervene, the appellate courts will not entertain new issues not previously contained in the motion to intervene. Again that is factually distinguishable from the procedural background of this case. Brizendine v. Conrad, 71 S.W.3d 587 (Mo. banc 2002) stands for the proposition that

a claim for setoff will not be entertained on appeal where it had not first been raised at trial.

What Respondents fail to realize is the difference between raising a new issue and expanding an argument. Obviously, the Romeos have always maintained that *Romeo v. Jones et al.* is not barred by res judicata. What the Romeos have done in their Substitute Brief before this Court is merely expand the argument as to why res judicata does not apply.

Respondents again misunderstand the res judicata elements. Respondents mistakenly believe that the first identity, i.e. the thing sued for, relates to the remedy sought. Resp. Br. 41. Respondents engage in an very elementary "analysis" and conclude that since the Romeos sought money in *Romeo v. DeRouin* as well as in *Romeo v. Jones, et al.*, then they have sued for the same thing and therefore, there is an identity. Respondents' understanding of this identity is wrong.

This Court has repeatedly defined the first identity as the "subject matter" of the lawsuit. In fact, Respondents' own case of Chesterfield Vill., Inc. v. City of Chesterfield, 64 S.W.3d 315 (Mo. banc 2002) again restates the law. There, this Court again looked at the "thing" sued for. Id. at 318. While Respondents place a fair amount of reliance upon Chesterfield, that opinion actually belies Respondents' argument. In Chesterfield, the remedy sought between the two actions differed greatly. Id. at 319. The first action was one for an injunction and declaratory relief. Id. at 317. The second action was one for damages. Id. The "requested remedy is

different." Id. This Court found that "[b]oth cases" sought "relief from the city's denial of rezoning in 1994." Id. at 320. Likewise, here the Romeos are **not** seeking relief from DeRouin's wrongful conduct. The subject matter of *Romeo v. DeRouin* differs from that of *Romeo v. Jones, et al.* Accordingly, the first identity is absent.

(c) The Second Identity: The issues in *Romeo v. Jones, et al.* differs from that of *Romeo v. DeRouin.*

The issues in *Romeo v. DeRouin* involved the wrongful conduct of DeRouin. The issues in *Romeo v. Jones* involve the wrongful conduct of the Respondents. Respondents incorrectly conclude that Romeos' cause of action in *Romeo v. DeRouin* was identical to their cause of action in *Romeo v. Jones, et al.* In Respondents' brief, they go to great length to compare and contrast the petitions from *Romeo v. DeRouin* with *Romeo v. Jones, et al.*, (Resp. Br. 33-35) presumably to show the similarity in issues. Respondents conveniently omit two very important purposes **alleged** by Romeos in the *Romeo v. Jones, et al.* petition: Romeos specifically alleged that **Respondents**, not DeRouin, abused process in the DeRouin lawsuit for the purpose of using discovery to gather information for use by third parties **and** to prevent the Romeos from seeking redress for the wrongs committed by defendants by filing, prosecuting and continuing said lawsuit. Nowhere in the petition against DeRouin do the Romeos make any allegation remotely similar. The reason for the additional two improper purposes contained in the *Romeo v. Jones, et al.* petition was that these were

purposes of **Respondents**, not DeRouin. ***Respondents*** were the parties responsible for propounding the improper interrogatories, not DeRouin. ***Respondents*** were the parties responsible for prolonging the DeRouin lawsuit, not DeRouin. Accordingly, ***Respondents*** are responsible for these improper purposes, not DeRouin. Givens v. Mullikin, 75 S.W.3d 383 (Tenn 2002).

(d) Public policy considerations are absent in the case at bar.

Apparently in response to the Romeos' simply pointing out that the concerns generally resulting in the application of res judicata are here absent, Respondents set forth their own public policy argument. Simply boiled down, Respondents are concerned that lawyers will be sued if this Court holds that res judicata does not bar the Romeos' action against the Respondents. Obviously, the possibility of lawyers being sued hardly qualifies as a public policy.

Romeos are not attempting to get a second bite at the apple. To the contrary, one can easily conclude that by being a named party in four lawsuits, the Romeos' appetite for litigation has been rather satisfied. The Respondents are joint tortfeasors along with DeRouin. According to the well-settled law of this state, the Romeos may sue them separately.

Romeos have not advocated anything new. The Romeos merely have brought an action against the Respondents for their individual, separate wrongful conduct. As

long as attorneys do not utilize discovery for an improper purpose or engage in other tortious, wrongful conduct, they should have no fear of being a defendant in a lawsuit.

CONCLUSION

Plaintiffs' action is not barred by the doctrine of res judicata as there was never an adjudication. Additionally, none of the res judicata elements are satisfied. Plaintiffs have adduced substantial evidence supporting a cause of action for abuse of process against the Respondents for their own wrongful, tortious conduct. Plaintiffs are entitled to submit their causes of action to a jury. The summary judgment of the trial court should be reversed and the matter remanded for trial.

Respectfully Submitted,

WITZEL, KENNEY & DIMMITT, L.L.C.

By:_____

Richard C. Witzel #25718
David A. Dimmitt #39555
Paul K. Travous #49484
2107 S. Brentwood Blvd.
St. Louis, Missouri 63144
314/962-0082
314/962-0092 (fax)
Attorneys for Appellants

CERTIFICATE OF COMPLIANCE

Come now Appellants, by and through their attorneys, and in accordance with Missouri Supreme Court Rule 84.06(c), the undersigned hereby certifies that Appellants' Substitute Reply Brief was prepared using Microsoft Word 97 SR-2, and that this brief complies with the limitations contained in Rule 84.06(b) in that this brief contains 6,341 words.

WITZEL, KENNEY & DIMMITT, L.L.C.

By:_____

Richard C. Witzel #25718
David A. Dimmitt #39555
Paul K. Travous #49484
2107 S. Brentwood Blvd.
St. Louis, Missouri 63144
314/962-0082
314/962-0092 (fax)
Attorneys for Appellants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the Appellants' Substitute Reply Brief, pursuant to Rule 84.05(a), along with one computer disk, pursuant to Rule 84.06(g), containing the Statement, Brief and Argument of Appellants, were hand-delivered to Thomas J. Hayek, attorney for Respondents, 7777 Bonhomme Ave., Ste. 1810, St. Louis, MO 63105 this 14th day of August, 2002.

WITZEL, KENNEY & DIMMITT, L.L.C.

By:_____

Richard C. Witzel #25718
David A. Dimmitt #39555
Paul K. Travous #49484
2107 S. Brentwood Blvd.
St. Louis, Missouri 63144
314/962-0082
314/962-0092 (fax)
Attorneys for Appellants